IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 138 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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C B I THROUGH THE SUPERINTENDENT OF POLICE

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Revision Application No. 138 of 2001

MR MUKESH R SHAH for Petitioner No. 1

MR HH PATEL, PUBLIC PROSECUTOR for Respondent No. 1

MR BM GUPTA for Respondent No. 2

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: /08/2001

C.A.V. JUDGEMENT

#. This revision has been filed by the Central Bureau of Investigation (for short, the CBI) challenging the order dated 28-3-2001 of the learned Special Judge rejecting

the application of the CBI for withdrawal of order directing the CBI to investigate in the offence and directing the CBI to complete the investigation upto 30-6-2001.

#. The brief facts giving rise to this revision are as under:

The respondent no.2, Rajendrakumar Bhailal Patel filed a complaint before the learned Special Judge, City Sessions Court, Ahmedabad, under secs.120-B, 467, 468, 471, 471(a) and 211 of the Indian Penal Code and under secs.13(1)(3) and 13(2) of the Prevention of Corruption Act. In that complaint, the learned Special Judge passed the following order :

> "CBI Gandhinagar is entrusted with investigation of this complaint under sec.156(3) of the Criminal Procedure Code. It be informed to send report next date fixed for submitting report is 30-8-2000."

#. This order was challenged by the CBI in SCA No.804/2000, which was decided on 17-2-2001. The petition was dismissed. However, the petitioner was directed to approach the Special Judge with its grievance made in the petition. In case, the CBI approaches the Special Judge, he will decide the issue within a period of two months. In compliance of this direction, the CBI moved an application vide Annexure-'C'. On hearing this application, the learned Special Judge passed the impugned order rejecting this application and directing the CBI to complete the investigation upto 30-6-2001. It is this order which is under challenge in this revision.

#. Special Public Prosecutor for the CBI for the revisionist, Shri BM Gupta for the respondent no.2 and Shri HH Patel, learned APP for the respondent no.1 were heard.

#. The only point pressed on behalf of the revisionist was that the learned Special Judge, in exercise of his jurisdiction on a complaint of the nature filed by the respondent no.2, could not have directed investigation to be done by the CBI under sec.156(3) of the Code of Criminal Procedure. The only short point involved for consideration in this revision, therefore, is whether the learned Special Judge could have directed, acting under sec.156(3) of the Code, the CBI, revisionist, to investigate and submit its report.

#. Shri BM Gupta, learned counsel for the respondent

no.1, however, raised a preliminary objection that the revision is not maintainable, because it is directed against an interlocutory order. In support of his contention, he has placed reliance upon a judgment of the Madras High Court in NATHAN v. VAITHINATHAN & ORS. 1975 CRI.L.J. 994. It was held in this case that an order of a Magistrate forwarding a complaint for an offence under sec.307, Penal Code, to Police for investigation and report under sec.156(3), is an interlocutory order to which sec.397(2) will apply. No revision lies against such order. Of course, if the impugned order is found to be an interlocutory order, no revision will lie as provided under sec.397(2) of the Code of Criminal Procedure. However, it has to be seen, whether the impugned order is an interlocutory order or it is a final order. On the face of it, the impugned order seems to be an interlocutory order, inasmuch as, it was passed under sec.156(3) of the Code. However, when the very jurisdiction of the Special Judge to pass such an order has been challenged, it is difficult to accept the contention that the impugned order is an interlocutory order. An order is said to be interlocutory in nature when it does not decide the case or rights and obligations of the parties finally. A final order is one which decides the matter finally one way or the other. In the instant case, if the Special Judge had no jurisdiction to issue direction, acting under sec.156(3) of the Code, to the CBI to investigate and report, then such order can not be said to be an interlocutory order. The CBI is duty bound to comply with the orders which can be passed legally by a Court. The CBI is neither legally nor morally bound to comply with the order of a Court which is patently without jurisdiction. If, the CBI goes on to comply with orders which are passed without jurisdiction, it will amount to compliance of nonest order or an order which is nullity. If it is found that the order is nonest or is nullity or is void-ab-initio, it can not be said that the revisional Court can not interfere in such matters only on the ground that the order is seemingly of an interlocutory nature. If it is found that the Special Judge had no jurisdiction to issue such direction to the CBI, then certainly, in exercise of the revisional jurisdiction, such order can be quashed and set aside, because such order will be illegal and contrary to law and also contrary to the observations of this Court and the Apex Court in two cases. I, therefore, do not find any force in the preliminary objection that the impugned order is an interlocutory order. The revision is, therefore, maintainable.

#. The only point for consideration in this revision is,

whether a Special Judge could have directed the CBI to investigate under sec.156(3) of the Code of Criminal Procedure and report to him about the offences mentioned in the complaint. It is undisputed that a private complaint was filed by the respondent no.2 against the accused. Action was taken by the Special Judge under sec.156(3) of the Code and he directed the CBI to investigate the matter. The Apex Court in latest pronouncement in CENTRAL BUREAU OF INVESTIGATION, JAIPUR v. STATE OF RAJASTHAN 2001 AIR SCW 305 examined conflicting decisions of the Delhi and Rajasthan High Court on one hand & Gujarat and Karnataka High Court on the other hand and found that the view taken by the High Court of Rajasthan and Delhi can not be substantiated. Decisions of Rajasthan and Delhi High Court were overruled by the Apex Court. It was held by the Apex Court that the magisterial power under sec.156(3) can not be stretched beyond directing the officer incharge of a police station to conduct the investigation. A Magistrate, therefore, has no power to direct the Central Bureau of Investigation, CBI, to conduct investigation into any offence. It was, further, laid down that sec.156 of the Code deals with investigation in the cognizable offence. If, the power of a Magistrate to order investigation by the CBI in non-cognizable cases can not be traced in sec.156, it is not possible to trace such power in any other provision of the Code. What is contained in sub-section (3) of sec.156 is the power to order the investigation referred to in sub-section (1), because the words "order such an investigation as above-mentioned" in sub-section (3) are unmistakably clear as referring to the other sub-section. Thus, the power is to order an 'officer incharge of a police station' to conduct investigation. From the definition of "police station" and "officer incharge of a police station", it is clear that a place or post declared by the Government as police station must have a police officer incharge of it. The primary responsibility for conducting investigation into offences in cognizable cases vests with such police officer. Sec.156(3) of the Code empowers a Magistrate to direct such officer incharge of the police station to investigate any cognizable case over which such Magistrate has jurisdiction. In para-15 of this judgment, the Apex Court concluded that, 'we, therefore, reiterate that the magisterial power can not be stretched under the said sub-section beyond directing the officer incharge of a police station to conduct the investigation.'

#. In view of this clear verdict of the Apex Court, there remains little scope for holding to the contrary

that a Special Judge can pass such an order. Shri BM Gupta, learned counsel for the respondent no.2 tried to distinguished this verdict of the Apex Court on the ground that in that case, the order was passed by a Magistrate, whereas in the case before me the order has been passed by the learned Special Judge and that the powers of a Special Judge can not be equated with the powers of a Magistrate. This distinction can not be accepted. No doubt, when allegation is for commission of an offence under sec.13(1)(3) or 13(2) of the Prevention of Corruption Act, the Special Judge has to conduct the trial and committal proceedings do not take place in such cases. But, for that matter, it can not be said that the Special Judge, in the instant case, could not have acted as if a Magistrate was acting on a private complaint. Undisputedly, a private complaint was filed by the respondent no.2. It was not a case brought before the learned Special Judge by the Police. If, the Special Judge was to entertain a private complaint, he was to act in accordance with the provisions of secs.200, 201, 202, 203 and 204 of the Code of Criminal Procedure. Under sec.202 of the Code, the Special Judge could have directed for further inquiry if he thought that further inquiry was required. The order to make such further inquiry could be given to the Police and not to the CBI. While dealing with such complaint, a Special Judge could not have ignored the provisions of sec.156(3) of the Code. Even, the impugned order shows that the first order passed on 31-7-2000 was directing the CBI, Gandhinagar to investigate the complaint under sec.156(3) of the Code. Thus, if, jurisdiction was exercised under sec.156(3) of the Code by the learned Special Judge, it can not be said that his direction was given by another court and not by a Magistrate. Even, a Special Judge is subordinate to the High Court. Shri BM Gupta, however, drew my attention to the definition of 'court' as enunciated by the Apex Court in SUPREME COURT LEGAL AID COMMITTEE v. UNION OF INDIA AND OTHERS JT 1994(6) S.C. 544. There is no controversy that the Special Court under the Prevention of Corruption Act is not a court under the Code of Criminal Procedure. This Court, in INDUMATI M.SHAH v. NARENDRA MULJIBHAI ASRA 1995 CRI.L.J. 918, has laid down that the subordinate court can not entrust investigation to any authority except referred to in sec.156 of the Code of Criminal Procedure. Thus, the view of this Court has earlier been that the subordinate courts can not entrust investigation to any authority except referred to in sec.156 of the Code, which means that the Magistrates, as well as, the Special Judges can not entrust the investigation to the CBI or any other authority except referred to in sec.156 of the Code.

#. Under sec.202 of the Code of Criminal Procedure, the Magistrate or for that purpose the Special Judge can postpone issue of process, if he thinks fit to do so and he may either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding. The words "such other person as he thinks fit" exclude reference to the CBI, more particularly in view of the Apex Court's verdict in Central Bureau of Investigation, Jaipur v. State of Rajasthan (supra).

##. Sec.156(1) provides that any officer incharge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII. Sub-section (3) of sec.156 provides that any Magistrate empowered under sec.190 may order such an investigation as above-mentioned. It is, thus, clear from sec.156(3) of the Code that such an investigation has to be done by any officer incharge of a police station and not by the CBI.

##. Shri BM Gupta placed reliance upon the Apex Court's verdict in ALL INDIAN INSTITUTE OF MEDICAL SCIENCES EMPLOYEES' UNION v. UNION OF INDIA AND OTHERS 1997 S.C.C.(Cri) 303. However, I find, after examination of this verdict, that it has no application to the facts of the case before me. Para-5 of the judgment clearly shows that this verdict was given on different facts. In that case, the facts were that information relating to commission of cognizable offence was given to the police, but no action was taken by the police. The complainant, instead of filing a complaint before the Magistrate having jurisdiction to take cognizance of the offence, approached the High Court by filing a writ petition under Art.226 of the Constitution of India, seeking a direction to conduct investigation by the CBI. The Apex Court held that, without availing of the procedure prescribed under the Code, he could not have approached the High Court by filing a writ petition. The procedure was highlighted by the Apex Court in para-4 of the judgment, which lays down that, when the information is laid with the police but no action in that behalf is taken, the complainant is given power under sec.190 read with sec.200 of the Code to lay the complaint before the Magistrate having jurisdiction to take cognizance of the offence and the Magistrate is required to enquire into the complaint as provided in Chapter XV of the Code. In case the Magistrate after

recording evidence finds a prima facie case, instead of issuing process to the accused, he is empowered to direct the police concerned to investigate into the offence under Chapter XII of the Code and to submit a report. If he finds that the complaint does not disclose any offence to take further action, he is empowered to dismiss the complaint under sec.203 of the Code. In case he finds that the complaint/evidence recorded prima facie discloses an offence, he is empowered to take cognizance of the offence and would issue process to the accused. It is only after complying with this provision that a writ under Art.226 of the Constitution of India could be prayed before the High Court. As such, in this case, it was not laid down that the Magistrate is competent to issue direction to the CBI to investigate the offence.

##. Since, the Special Public Prosecutor of the CBI did not press the point that the impugned order could not be passed without the consent of the State Government, I do not think it necessary to discuss the pronouncement of the Apex Court in STATE OF WEST BENGAL v. SAMPATLAL AND OTHERS AIR 1985 S.C. 195 cited by Shri Gupta.

##. For the reasons stated above, I am of the view that the revision is maintainable and the impugned order is illegal, because it runs contrary to Apex Court's latest verdict in Central Bureau of Investigation, Jaipur v. State of Rajasthan (supra).

##. The revision, therefore, succeeds and is hereby allowed. The impugned order is set aside. The learned Special Judge will be at liberty to direct further investigation, if he so desires, to the officers mentioned, under sec.202(1) read with sec.156(3) and 156(1) of the Code of Criminal Procedure.

Dated : __/8/2001. (D.C. Srivastava, J.)

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